Public Prosecutor v Khairul Al Sidek bin Lurin & Anor

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO K45–09 OF 2008
ABDUL RAHMAN SEBLI JC
24 FEBRUARY 2010

Criminal Law — Murder — Juvenile — Juvenile accused ordered to be detained at the pleasure of Yang Di-Pertua Negeri of Sabah — Whether case proven beyond reasonable doubt — Child Act 2001

Criminal Law — Murder — s 302 of the Penal Code — Defence — Defence of grave and sudden provocation, sudden fight and intoxication — Whether established

Criminal Law — Penal Code — s 34 — Common intention — Head injuries — Unknown who among three assailants inflicted injuries — Whether common intention was to cause death — Whether established

Criminal Procedure — Trial — Close of prosecution's case — Murder case — Whether accused persons cast reasonable doubt on prosecution's case — Whether conviction warranted

The deceased and his friends, PW8, PW9, PW11, Elwin and Bakri, were chatting at Taman Seri Baru, Menggatal, when they were attacked viciously and without provocation by the three accused persons namely, the first accused, the second accused and the third, one Nort, who is still at large. PW9 and Bakri ran towards one of the houses at Taman Seri Baru. From his hiding place, PW9 saw the deceased being chased by the three male persons and then assaulted him with belts and a piece of wood. PW9 could clearly see the second accused using a belt to hit the deceased while the first accused was using a piece of wood. All three persons continuously hit the deceased. The incident was also witnessed by PW7, PW10 and PW13, neutral and disinterested witnesses, who happened to be at the scene simply because the attack took place in front of their houses. The assailants only left after the deceased lay seriously injured on the road. PW7, who was closest to the action, pleaded with the assailants to stop assaulting the deceased but his plea fell on deaf ears. PW9 and PW11 testified in no uncertain terms that they did not start the fight. However, it was contended on behalf of the accused persons that there was no evidence as to who among the three assailants that

had actually inflicted the fatal head injuries. Further, both accused have raised the defence of provocation, sudden fight and intoxication.

Held, sentencing the second accused to death; the first accused to be detained at the pleasure of the Yang Di-Pertua Negeri of Sabah:

(1) Common intention is a question of fact to be deduced from the surrounding circumstances of the case. The acts on the part of the three assailants provided conclusive proof that their common intention was to cause death to the deceased (see para 28).

(2) To succeed in the defence of provocation, it was not sufficient for the first and second accused to merely show that they had been provoked by the deceased. They must prove on the balance of probabilities that the provocation was both grave and sudden either by words or action. The fact that the deceased was 'temberang' or 'sombong', even if true, could not by any yardstick amount to grave and sudden provocation (see para 44).

(3) To succeed in the defence of sudden fight, it is necessary for the accused to establish, first and foremost, that there was a fight. This is a question of fact. On the evidence it was clear that when the two accused and the third person assaulted the deceased resulting in the fatal injuries, there was no fighting between them and the deceased. It was a one way attack on the deceased who did not fight back. The defence is only available if the fatal injuries were inflicted during a fight and not where, as here, the injuries were inflicted on a victim who did not offer any resistance at all (see para 49).

(4) The defence of intoxication clearly did not apply as there was no evidence that the two accused were intoxicated at the time they assaulted the deceased. It was for them to prove on the balance of probabilities that they were intoxicated and not for the prosecution to prove otherwise. The fact that they consumed 'Golden Ice' and 'Tanduay', even if true was not evidence that they were intoxicated at the material time. In any event by virtue of sub-s 85(2)(a) of the Penal Code voluntary drunkenness is no excuse for the commission of a crime (see para 53).

(5) It is settled principle that the accused is entitled to acquittal if his explanation has cast a reasonable doubt in the court's mind as to the truth of the prosecution's case. Thus, even if the court were to disbelieve the accused's explanation the court must not proceed to enter a conviction unless the court is satisfied that the prosecution has proved its case beyond reasonable doubt. On the facts, the explanation of the two accused had not cast any reasonable doubt as to their guilt. Hence,

A the court was satisfied that the prosecution had proved its case against the two accused beyond reasonable doubt (see paras 55 & 57).

[Bahasa Malaysia summary

B Si mati dan rakan-rakannya, PW8, PW9, PW11, Elwin dan Bakri, sedang berbual-bual di Taman Seri Baru, Menggatal, apabila mereka diserang dengan kejam dan tanpa provokasi oleh tiga tertuduh iaitu, tertuduh pertama, tertuduh kedua dan ketiga, seorang bernama Nort, yang masih bebas. PW9 dan Bakri lari ke arah salah satu daripada rumah di Taman Seri Baru. Daripada tempat persembunyian, PW9 nampak si mati dikejar oleh tiga
C orang lelaki dan kemudian menyerangnya dengan tali pinggang dan sebatang kayu. PW9 dapat melihat dengan jelas tertuduh kedua menggunakan tali pinggang untuk memukul si mati manakala tertuduh pertama menggunakan sebatang kayu. Ketiga-tiga mereka memukul si mati bertubi-tubi. Kejadian itu juga disaksikan oleh PW7, PW10 dan PW13, saksi-saksi berkecuali dan
D tidak berkepentingan, yang kebetulan berada di tempat kejadian hanya kerana serangan itu telah berlaku di depan rumah mereka. Penyerang-penyerang itu hanya meninggalkan tempat itu setelah si mati terlantar dengan kecederaan teruk di atas jalan. PW7, yang berada paling hampir dengan kejadian itu, merayu kepada penyerang-penyerang itu untuk
E berhenti menyerang si mati tetapi rayuannya tidak diendahkan. PW9 dan PW11 telah memberikan keterangan yang mereka tidak langsung terlibat dalam memulakan pergaduhan itu. Walau bagaimanapun, ia telah dihujahkan bagi pihak tertuduh-tertuduh bahawa tiada keterangan tentang siapa antara mereka bertiga sebenarnya yang telah menyebabkan kecederaan
F di kepala yang membawa maut. Bahkan, kedua-dua tertuduh telah menimbulkan pembelaan provokasi, pergaduhan secara tiba-tiba dan berkeadaan mabuk.

G **Diputuskan**, menjatuhkan hukuman mati ke atas tertuduh kedua; tertuduh pertama ditahan atas perkenan Yang Di-Pertua Negeri Sabah:

(1) Niat bersama adalah persoalan fakta yang perlu disimpulkan daripada keadaan sekeliling kes. Tindakan-tindakan di pihak ketiga-tiga penyerang memberikan bukti konklusif bahawa niat bersama mereka
H adalah untuk menyebabkan kematian si mati (lihat perenggan 28).

(2) Untuk berjaya dalam pembelaan provokasi, ia tidak memadai untuk tertuduh pertama dan tertuduh kedua hanya menunjukkan yang si mati telah membangkitkan kemarahan mereka. Mereka perlu membuktikan atas imbangan kebarangkalian bahawa provokasi itu adalah serius dan
I mengejutkan sama ada melalui perkataan atau tindakan. Fakta bahawa si mati 'temberang atau 'sombong', jikapun benar, tidak dapat mengukur provokasi yang serius dan mengejut (lihat perenggan 44).

(3) Untuk berjaya dalam pembelaan untuk pergaduhan secara tiba-tiba, adalah wajar untuk tertuduh membuktikan, terlebih dahulu dan paling utama, bahawa telah berlaku pergaduhan. Ini adalah persoalan fakta. Atas keterangan adalah jelas bahawa apabila kedua-dua tertuduh dan orang ketiga menyerang si mati sehingga mengakibatkan kecederaan yang membawa maut, tidak ada pergaduhan antara mereka dan si mati. Ia merupakan serangan satu hala ke atas si mati yang tidak menyerang balik. Pembelaan itu hanya boleh digunakan jika kecederaan yang membawa maut itu dialami semasa pergaduhan dan bukan di mana, seperti di sini, kecederaan yang diakibatkan ke atas mangsa yang tidak melawan langsung (lihat perenggan 49).

(4) Pembelaan berkeadaan mabuk jelas tidak boleh digunakan kerana tiada bukti yang kedua-dua tertuduh mabuk pada masa mereka menyerang si mati. Mereka perlu membuktikan atas imbangan kebarangkalian bahawa mereka mabuk dan bukan untuk pihak pendakwaan membuktikan sebaliknya. Hakikat bahawa mereka telah minum 'Golden Ice' dan 'Tanduay', jikapun benar bukan bukti yang mereka mabuk pada masa matan. Dalam apa keadaanpun menurut sub-s 85(2)(a) Kanun Keseksaan sifat kemabukan yang sengaja bukanlah alasan untuk melakukan jenayah (lihat perenggan 53).

(5) Adalah prinsip tetap bahawa tertuduh berhak dibebaskan jika penjelasannya, pada pendapat mahkamah menimbulkan keraguan munasabah tentang kebenaran kes pendakwaan. Oleh itu, jikapun mahkamah tidak mempercayai penjelasan tertuduh mahkamah tidak boleh terus memasukkan sabitan kecuali jika mahkamah berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah. Berdasarkan fakta berikut, penjelasan kedua-dua tertuduh tidak menimbulkan apa-apa keraguan yang munasabah tentang kebersalahan mereka. Justeru itu, mahkamah berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya terhadap kedua-dua tertuduh melampaui keraguan yang munasabah (lihat perenggan 55 & 57).]

Notes

For cases on close of prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

For cases on murder in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1154–1167.

For cases on s 34 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1267–1287.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Mat v PP [1963] MLJ 263; [1963] 1 LNS 82, HC (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Azman bin Ismail & Ors [2007] 3 MLJ 628; [2007] 10 CLJ 469 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (folld)
PP v Ibrahim Mahmud [2001] 3 CLJ 284, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Rex v Vincent Banka & Anor [1936] MLJ 53, CA (refd)

Legislation referred to

Child Act 2001 s 2(1)
Criminal Procedure Code s 182A
Penal Code ss 34, 85(2), 85(2)(a), 300, 300(a), (b), (c), (d), Exceptions 1, 1(a), 4
Penal Code [IND]

Mohamed Zairi bin Zainal Abidin (Deputy Public Prosecutor, Attorney General's Chambers, Sabah) for the prosecution.
John Sikayun (Luping & Co) for the first accused.
Gaanesh Nandy (Gaanesh & Co) for the second accused.

Abdul Rahman Sebli JC:

THE CHARGE

[1] The two accused were charged with an offence specified in the following charge:

> That you together with one other still at large, on 14th August 2008 at around 7.30pm, in front of a house No 13, Lorong 1, Taman Seri Bayu, Menggatal, in the District of Kota Kinabalu, in the State of Sabah, in furtherance of the common intention of you all, did murder MOHD AZLIE HANIF BIN GAZALI, identification Card No 891128-12-5905 and that you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same Act.

THE PROSECUTION CASE

[2] The prosecution's case is fairly straightforward and can be summarised as follows. On 14 August 2008 at about 7pm the deceased who was 18 years old at the time of the incident had gone to Menggatal town with some friends to play internet games at an internet café. With him were PW8, PW9, PW11, Elwin and Bakri. Half an hour later they proceeded to Taman Seri Baru, Menggatal to 'lepak'. While they were chatting away and playing the guitar at the staircase of the park a male person later identified as the second accused

approached them and asked for their names and shook their hands. Then out of a sudden another male person later identified as the first accused appeared from behind the second accused and started to hit them with a belt. By this time they realised that there were three male persons who had approached them. All three attacked PW8, PW9, PW11 and the deceased. According to PW11 one of the assailants had his belt rolled around his hand.

[3] On being assaulted the deceased and his friends fled towards Taman Seri Baru in different directions with the three male persons hot on their heels. The three persons were armed with wood and belt.

[4] PW9 and Bakri ran towards one of the houses at Taman Seri Baru where they hid inside. From his hiding place PW9 could see the deceased being chased by the three male persons and then assaulted with belts and a piece of wood. The deceased was hit in the head and he was trying to defend himself. PW9 could clearly see the second accused using a belt to hit the deceased while the first accused was using a piece of wood. All three persons continuously hit the deceased. As a result of the assault, the deceased fell into the drain. The first accused then took a flower vase (P19) and threw it at the deceased. The three assailants fled the scene when someone shouted 'panggil polis! panggil polis!'.

[5] The incident was also witnessed by PW10 and her son PW13. They live at No 13, Lorong 1, Taman Seri Baru Menggatal. PW10's testimony is that at about 8pm she heard a commotion outside her house. She and her son PW13 went out to investigate and saw three male persons assaulting the deceased with a belt and a piece of wood. The deceased was in the drain in front of one of the houses when they first saw him. They were hitting the deceased on the head and body.

[6] PW10 identified the first accused as the person who hit the deceased with the wood and the second accused as the person who hit the deceased with the belt. PW10 shouted for help whereupon PW7 came out from his house to try to stop the assault. According to PW10, PW7 pleaded with the assailants to stop the assault but the three assailants ignored his plea.

[7] After the first attack, the deceased was helped out of the drain by PW7. As he was standing on the road, PW10 overheard him saying to PW7 'pakcik pakcik tolong saya pakcik dia orang datang lagi'. It was at this point that the three assailants returned and continued to hit the deceased on the head using the same wood and belt. According to PW13 the assailants hit the deceased on the head until he fell down and after he had fallen down they continued to hit him. They only left after the deceased lay seriously injured on the road.

[8] Under cross-examination by counsel for the second accused PW13 said two of the assailants used belts to attack the deceased.

[9] PW7 was closest to the action during the second assault. His evidence is that he was watching the 8pm TV news when he heard a commotion outside his house. He went out and saw two male persons assaulting the deceased with a belt and a piece of wood. He described the wood as 'kayu beruti'. The taller of the two hit the deceased with the wood while the shorter one hit him with the belt. Both of them were hitting the deceased on the head. The deceased did not offer any resistance when he was assaulted. PW7 pleaded with the assailants to stop assaulting the deceased but his plea fell on deaf ears. In an effort to stop the assault PW7 held on to one of the male persons but the other male continued to hit the deceased. It was only later that they ran away.

[10] After the assailants left, PW7 went over to the deceased. The deceased was crying for help and trying to get on his feet. He managed to stand up but sat down after about two minutes. There was blood on his head. PW7 then brought the deceased to the Menggatal clinic. PW7 however could not confirm if it was the two accused who had assaulted the deceased that night.

[11] The forensic pathologist Dr Jessie Hiu ('PW4') who performed the autopsy on the deceased confirmed that his death was due to the injuries on the head. She found lacerations on the head with underlying skull fractures, intracranial haemorrhage and external and internal injuries to the brain. In her opinion the head injuries were fatal in nature and that the deceased was unlikely to survive them. She testified that the two lacerations on the left side of the deceased's head could be caused by a heavy blunt object such as a piece of heavy wood, a rock, a block of cement or a heavy metal rod.

[12] In cross-examination she testified that the fatal head injuries could be caused by a piece of heavy wood. PW4 had also examined the belt (P21) seized from the second accused. She found the metal buckle of the belt to weigh 220g. She said it was heavy and blunt and could cause skull fracture and brain injury. I accept her expert opinion on the cause of death and the type of weapons that could have been used to cause the fatal head injuries.

[13] An identification parade was held by PW15 five days after the arrest of the two accused. PW8, PW9 and PW11 positively identified both accused while PW10 and PW13 identified the first accused only. I am satisfied that the identification parade was conducted properly and fairly by PW15. In any event her testimony was not challenged at all in cross-examination. I find no merit in counsels' submissions that the identification parade was procedurally flawed.

[14] The 'kayu beruti' was not produced as evidence but in my view the failure to do so is of no consequence because it is clear that a piece of wood was indeed used in the commission of the offence. A

[15] It was put to PW11 in cross-examination that one of his friends assaulted the person who asked their names. PW11 emphatically denied the allegation. This evidence seems to be contradicted by PW8 who under cross-examination by counsel for the first accused agreed that the fight started after 'he or one of his friends' attacked the second accused using a belt (p 90 of the notes of proceeding). He also agreed with counsel that it was the deceased who attacked the second accused first (p 91 of the notes of proceeding). B C

[16] I have scrutinised PW8's answer on this point and tested it against the rest of the evidence and the probabilities of the case. The first thing to note is that right after giving that answer PW8 disagreed with counsel that they started the fight. The Q & A proceeded as follows: D

> Q: Saya katakan pada kamu kamu bohong apabila kamu atau kawan-kawan kamu tidak terlibat bukan memulakan pergaduhan itu dan hanya hal ini antara si mangsa dan tertuduh. E
>
> A: Tidak betul.

[17] Later in cross-examination it was put to him that they started the fight as they had the numbers and were drunk. PW8 disagreed. It was then put to him that he did not dare call the police when the deceased was assaulted because they were the ones who started the fight. Again PW8 disagreed. In re-examination he reiterated that it was the three assailants who started the fight. He was adamant that he and his friends were only defending themselves. F G

[18] PW9 and PW11 testified in no uncertain terms that they did not start the fight. I have pondered over the matter and I am inclined to believe that although there might have been some exchange of words between the boys and any one of the assailants, it is highly improbable that they had started the fight, let alone to have assaulted any one of the assailants. If at all the boys had retaliated it was to defend themselves. There was no reason for them to attack any one, least of all the second accused who was a stranger to them. In my view PW8 must have been mistaken when he said under cross-examination that 'he or one of his friends' had attacked the second accused using a belt and that the deceased had attacked the second accused first. H I

[19] Judging from the ferocity of the attack on the deceased after the incident at the park (which led to his death) and the act of the three assailants in chasing after the boys armed with wood and metal buckled belts, it is highly unlikely that it was the boys who were the aggressors. Furthermore why would they run away if indeed they were itching for a fight as the defence seems to be suggesting. After all there were six of them as against only three assailants. They also had with them a guitar which could be used as a weapon of offence. From the question put to PW8 it is obvious that the defence was not even sure if it was PW8 himself or 'one of his friends' who attacked the second accused.

THE LAW AND ELEMENTS OF CHARGE

[20] Murder is defined in s 300 of the Penal Code as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) If the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[21] The elements of the charge that the prosecution need to establish beyond any reasonable doubt against the two accused are:

(a) That the victim Mohd Azlie Hanif bin Gazali had died.

(b) That the victim died as a result of the fatal head injuries sustained by him.

(c) That the fatal head injuries were caused by any one or more of the three assailants.

(d) That in inflicting those fatal head injuries the act was committed with the mens rea under s 300(a), or (b), or (c) or (d) of the Penal Code.

(e) That the act was done in furtherance of the common intention of all three assailants.

WHETHER PRIMA FACIE CASE ESTABLISHED

[22] In deciding whether the prosecution had established a prima facie case against the two accused I had subjected the prosecution's evidence to a maximum evaluation which included assessing the creditworthiness of the witnesses called by the prosecution. Having done that I was satisfied that the evidence was strong enough to convict the accused if they had elected to remain silent. The test is laid down by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 in the following terms:

> Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar bin Hashim & Anor v Publc Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[23] The Federal Court endorsed the following description of a prima facie case by Augustine Paul J in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215:

> A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called to on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen.

[24] On the strength of evidence required to establish a prima facie case the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 set the standard as follows at p 316 (MLJ); p 100 (CLJ):

> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proven beyond reasonable doubt.

[25] There were eyewitnesses to this murderous assault, namely PW7, PW9, PW10, and PW13. PW7, PW10 and PW13 in particular are neutral and disinterested witnesses who happened to be at the scene simply because the attack took place in front of their houses. I am satisfied that these eyewitnesses are witnesses of truth and I accept their evidence that the

deceased was hit on the head with belt and wood by the assailants. I am further satisfied that the victim Mohd Azlie Hanif bin Gazali had died and that his death was due to the injuries inflicted by the three assailants.

[26] Learned counsel for the accused in their joint written submissions dated 13 October 2009 pointed out that there is no evidence who among the three assailants that had actually inflicted the fatal head injuries. I see nothing in the point taken as the prosecution is relying on s 34 of the Penal Code. Section 34 of the Penal Code provides as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[27] In *The Law of Crimes* by Ratanlal & Dhirajlal (22nd Ed) the learned authors outlined three types of acts which constitute the furtherance of the common intention of all as follows:

> The act done in furtherance of the common intention of all includes in it three types of acts; firstly, the act which is directly intended in between all the confederates; secondly, the act which the circumstances of the case leave no doubt to conclude that though the act was not directly intended in between them but was taken by all of them as included in the common intention, and thirdly, the act which any of the confederates commits in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention.

[28] It is trite to say that common intention is a matter of inference to be deduced from the surrounding circumstances of the case. It is a question of fact to be determined upon the evidence in each individual case. See *Rex v Vincent Banka & Anor* [1936] MLJ 53, and common intention can develop on the spot. See *Public Prosecutor v Azman bin Ismail & Ors* [2007] 3 MLJ 628; [2007] 10 CLJ 469. On the facts of the present case the following acts on the part of the three assailants provide conclusive proof that their common intention was to cause death to the deceased:

(a) All three assailants, armed with wood and belt chased after the deceased.

(b) When they caught up with the deceased all three of them jointly attacked the deceased who was alone and unarmed.

(c) All three assailants hit a vital part of the deceased's body, namely the head during the first attack at the drain.

(d) A heavy piece of wood (see evidence of the pathologist) and a metal buckled belt (which according to the pathologist could cause skull fracture and brain injury) were used to hit the deceased's head.

(e) After fleeing from the scene after the first attack (during which a flower vase was also thrown at the deceased), the three assailants returned to the scene and the first and second accused continued to assault the deceased, again on the head with the wood and belt. Their intention must have been to finish off the deceased.

(f) The assailants continued to assault the deceased despite PW7's plea to stop the assault and despite the presence of bystanders.

(g) The assailants only stopped assaulting the deceased after the deceased collapsed to the ground with a bloody head, mission accomplished.

COURT'S DUTY AT END OF TRIAL

[29] At the conclusion of the trial the duty of the court is to consider all the evidence produced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. See s 182A of the Criminal Procedure Code. If, upon a review of the whole evidence there is a reasonable doubt as to the guilt of the accused, he must be acquitted (*Public Prosecutor v Ibrahim Mahmud* [2001] 3 CLJ 284). A case is said to have been proved beyond reasonable doubt only upon a consideration of all the evidence adduced (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85).

THE DEFENCE

[30] Both accused chose to give evidence under oath. I shall first deal with the defence of the first accused. His evidence is that he was drunk when he, the second accused and another person by the name of Nort approached the deceased and his friends at Taman Seri Baru. As they approached the group of boys the first accused claimed that the second accused was assaulted with a belt by 4–5 of the boys (what was put to PW8 in cross-examination however was that only one of the boys did). He said he has no idea why the second accused was assaulted but explained that prior to the incident he did scold the boys for smoking in the bus where he worked as a conductor. He said that when he came to the second accused's aid he in turn was hit with a belt as well. He added that when Nort came to assist them, the boys dispersed.

[31] In further examination-in-chief the first accused said the three of them did not chase after the boys but changed his story almost immediately when he said he and Nort gave chase. He said it was Nort who chased after the deceased. When asked if he managed to get hold of the boys he said he did not because he was still drunk.

[32] He went on to say that after Nort caught up with the deceased, he saw the two of them fighting and the deceased was lying on the road. When asked by counsel for the second accused where Nort caught up with the deceased he said it was at Taman Seri Baru. He said Nort hit the deceased with a belt. He candidly admitted that he joined in the assault by hitting the deceased with a piece of wood. He said he took the wood from the deceased which the deceased had used to hit him. He said the deceased's friends did come to his (the deceased) aid and hit him and Nort with wood and belt. Asked by counsel how he hit the deceased, he said he is not sure despite admitting moments earlier that he hit the deceased with a piece of wood. He denied that he and Nort continued to hit the deceased after the deceased fell on to the road. He claimed that the second accused was not at the scene when he and Nort assaulted the deceased.

[33] In cross-examination the first accused said he drank eight bottles of 'Golden Ice' liquor and five bottles of 'Tanduay' brand liquor that day. Asked what the second accused did when he was assaulted by the 4–5 boys he said the second accused stood still. He confirmed that the deceased did fall into the drain. Under cross-examination by counsel for the second accused he said he pulled Nort away when someone shouted 'polis! polis!'.

[34] The first accused's explanation confirms in material particulars the evidence of the eyewitnesses, in particular PW9's and PW10's evidence that he hit the deceased with a piece of wood on the head.

[35] As for the second accused his explanation is as follows. On the date of the incident he and the first accused together with three others namely Jun, Along and Nort had a drinking session at the Menggatal bus terminal. He described Nort as 'orangnya brutal dan banyak cakap'. He said he drank one big bottle of 'Tanduay' but immediately revised the figure to four big bottles. He said he felt tipsy and proceeded to a 7-Eleven outlet together with the first accused and Nort with the intention of buying more liquor. Then they saw a group of boys sitting at the park playing the guitar and drinking liquor. The second accused said he approached them and shook their hands and asked if he could join them drinking. But as he was shaking their hands suddenly one of the boys stood up, went behind his back and started to hit him. The other boys then joined in, assaulting him with a belt. He said he avoided the assault. The first accused then came to his aid but he too was assaulted. He said Nort then suddenly appeared and came to their aid. He said when Nort arrived the boys ran away. He went on to testify that Nort and the first accused then chased after the boys.

[36] The second accused claimed that after being assaulted by the boys using belts he stood still for a while before joining Nort and the first accused to chase after the boys. He said he did not succeed in catching any of the boys but added that before he chased the boys he saw the deceased falling into the drain. He said he saw Nort and the first accused assaulting the deceased. Nort used a belt while the first accused used a piece of wood. He claimed that the deceased fought back when he was assaulted by Nort and the first accused. He added that he ran away after seeing the deceased lying on the road. When they reunited later at the 7-Eleven outlet, he asked the first accused why the boys assaulted him and the first accused told him he had no idea.

[37] In cross-examination by counsel for the first accused he said the boys were 'temberang' and 'sombong' when he asked to join them in the drinking session. When asked with what object the boys hit him he said some of them used belts and some used their fists. He said he did shout for help.

[38] Under cross-examination by the DPP the second accused said Nort and the first accused did not follow him to meet the boys because Nort went to the Bus Wash while the first accused was making a phone call. He added that before he was assaulted he saw the boys removing their belts but he just stood still. He said he continued to stand still even as the boys were assaulting him. Asked why he did not run away when he saw the boys removing their belts his answer was 'Habis saya masih pening dipukul'. Asked why he did not run away after he was assaulted, again the reason was that he was still tipsy. Questioned why the boys ran away after the arrival of Nort he answered 'Mana saya tahu?' He denied that he assaulted the deceased with a belt and kicking him in the head and body.

[39] In re-examination he was asked what he meant when he said he was 'pening kepala' when he was assaulted by the boys and he said it was because he had been hit in the head by the boys.

EVALUATION OF DEFENCE EXPLANATION

[40] I have seriously considered the defence of the first and second accused separately and I do not find any semblance of truth in either of them. Having regard to the weight of evidence and the probabilities of the case I reject their claim that they were assaulted by the boys. I am left in no reasonable doubt that they together with another person still at large viciously and without provocation attacked the deceased at Taman Seri Baru, with the first accused arming himself with a piece of wood and the second accused arming himself with a belt with metal buckle. There is uncontrovertible evidence that the two accused and Nort jointly attacked the deceased after catching up with him although the first accused tried to cover the second accused by saying that

only he and Nort did so. I reject the second accused's claim that he did not touch the deceased. His evidence that he stood still as the boys were assaulting him with fists and belts is absurd. This is a blatant lie and a clear indication of his unreliability as a witness.

[41] The clear impression I get from the defence explanation is that having taken active part in the assault on the deceased, they had to try to convince the court that it was Nort, the other person still at large who is to blame for the death of the deceased. This is clear from the second accused's depiction of Nort as 'orangnya brutal dan banyak cakap'. It is a convenient defence knowing that Nort is not in court to defend himself. Even if it was only Nort who inflicted the fatal injuries on the head, which in any event is contrary to the evidence, this provides no escape route for the two accused as they had acted with common intention.

[42] Learned counsel for both accused have raised the defence of provocation and sudden fight without specifying under which provisions of the law the defences are relied upon. Presumably counsel are referring to Exceptions 1 and 4 to s 300 of the Penal Code. Exception 1 provides as follows:

> *Exception 1* — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any person by mistake or accident.

[43] This reliance is purportedly based on the defence assertion that the boys were 'temberang' (liars) and 'sombong' (snobbish) and had attacked the second accused when the second accused approached them at the park.

[44] To succeed in the defence of provocation it is not sufficient for the first and second accused to merely show that they had been provoked by the deceased. They must prove on the balance of probabilities that the provocation was both grave and sudden either by words or action. I find no such evidence. Their claim that one of the boys suddenly attacked the second accused as he was extending his hand of friendship sounds hollow. The accused did not even explain in what way the boys were 'temberang' or 'sombong'. The fact that the deceased was 'temberang' or 'sombong', even if true, cannot by any yardstick amount to grave and sudden provocation. In any event I am inclined to believe that the intention of the three assailants when they approached the boys at the park was to look for trouble. The defence of grave and sudden provocation is therefore not open to them. This is expressly provided by proviso (a) to Exception 1 which states:

The above exception is subject to the following provisos:

(a) That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

[45] The boys were at the park enjoying themselves, chatting and playing the guitar. Fighting could not have been on their minds. This is manifested by the fact that when the three assailants started to whack them they ran helter skelter. The question of grave and sudden provocation therefore does not arise at all.

[46] It is pertinent to note that in the cross-examination of PW8, PW9, and to a certain extent PW11 it was put to them that they were drunk at the park, which they denied. In fact they denied drinking any liquor at all. This denial must be the truth because nowhere in the evidence of the first and second accused did they say that the boys were drunk. If it was their instruction (to their solicitors) that the boys were drunk, it is strange that they did not affirm that fact under oath. The same goes with the defence allegation that the boys were 'temberang' and 'sombong'.

[47] It is trite that what counsel put across to witnesses during cross-examination are not evidence unless the suggestions are admitted by the witnesses or are proven by other evidence. Factual matters that are put across in cross-examination but not proved by formal evidence remain mere allegations and have no evidential value whatsoever.

[48] As for the defence of sudden fight Exception 4 to s 300 of the Penal Code provides as follows:

Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

[49] To succeed in the defence of sudden fight it is necessary for the accused to establish, first and foremost, that there was a fight. This is a question of fact. On the evidence it is clear that when the two accused and the third person assaulted the deceased resulting in the fatal injuries, there was no fighting between them and the deceased. It was a one way attack on the deceased who did not fight back. They had cornered the deceased and then assaulted him at will. It was a premeditated attack on the deceased. The question of sudden fight within the meaning of Exception 4 therefore does

not arise at all. The defence is only available if the fatal injuries were inflicted during a fight and not where, as here, the injuries were inflicted on a victim who did not offer any resistance at all. There is no mystery in the word 'fight' in Exception 4. It must be given its popular and ordinary meaning. It takes two to make a fight. There can be no fight if there is no exchange of blows.

[50] Even assuming for a moment that the assault was a continuation of the earlier 'fight' at the park, the defence is still not available to the accused as they had clearly taken undue advantage and had acted cruelly towards the deceased. The deceased was alone and unarmed whereas there were three of them and armed with a piece of heavy wood and metal buckled belt. It is obvious that the deceased was in no position to fight back and was clearly at the mercy of the three assailants, who showed no mercy at all. In commenting on a similar provision in the Indian Penal Code the learned authors of *The Law of Crimes*, said at p 768:

> To bring a case within this Exception all the facts mentioned in it must be found. If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage and is not entitled to the benefit of this Exception.

[51] Learned counsel also urged this court to make a finding that the two accused were intoxicated at the time of the offence as according to counsel they had been drinking 'Golden Ice' and 'Tanduay'. Counsel are of course suggesting that the defence of intoxication is available to the two accused. With due respect, counsel have misappreciated the law on the defence of intoxication. Subsection 85(2) of the Penal Code provides as follows:

> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[52] To avail themselves of this defence the accused must prove on the balance of probabilities the following:

(a) they were intoxicated at the material time;

(b) by reason of the intoxication they did not know what they were doing or did not know that what they did was wrong;

(c) their intoxication was due to the malicious or negligent act of another person; or

(d) they were by reason of the intoxication insane at the time they assaulted the deceased.

[53] Going by the above conditions, the defence of intoxication clearly does not apply as there is no evidence that the two accused were intoxicated at the time they assaulted the deceased. It is for them to prove on the balance of probabilities that they were intoxicated and not for the prosecution to prove otherwise. The fact that they consumed 'Golden Ice' and 'Tanduay', even if true is not evidence that they were intoxicated at the material time. In any event by virtue of sub-s 85(2)(a) of the Penal Code voluntary drunkenness is no excuse for the commission of a crime.

[54] As for the question of knowledge there can be no doubt that the first and second accused knew what they were doing. They did not even deny this in their defence. Did they know that what they did to the deceased was wrong? Having regard to the evidence it will be a long shot to suggest that they did not know. This is also not part of their defence.

[55] It is settled principle that the accused is entitled to acquittal if his explanation has cast a reasonable doubt in the court's mind as to the truth of the prosecution's case. Thus even if the court were to disbelieve the accused's explanation the court must not proceed to enter a conviction unless the court is satisfied that the prosecution has proved its case beyond reasonable doubt. The prosecution would fail to satisfy the onus which lies upon it if on the whole evidence the court is left in a real state of doubt as to his guilt (*Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[56] Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. As Lord Denning said in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[57] In the instant case the explanation of the two accused has not cast any reasonable doubt in my mind as to their guilt. I am satisfied that the prosecution has proved its case against the two accused beyond reasonable doubt. It follows therefore that they must be convicted of the offence charged. I have accordingly sentenced the second accused to death while the first accused was ordered to be detained at the pleasure of the Yang Di-Pertua Negeri of Sabah as he was a child within the meaning of s 2(1) of the Child Act 2001 at the time of the offence.

Second accused sentenced to death; first accused to be detained at the pleasure of the Yang Di-Pertua Negeri of Sabah.

Reported by Ashgar Ali Ali Mohamed